IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-862

UNITED AIR LINES, INC.,

Appellant,

vs.

GEORGE E. MAHIN, ET AL.,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS.

BRIEF AS AMICI CURIAE IN SUPPORT OF JURISDICTIONAL STATEMENT.

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BRIEF AS AMICI CURIAE OF AMERICAN AIRLINES, INC., BRANIFF AIRWAYS, INCORPORATED, and NORTHWEST AIRLINES, INC. IN SUPPORT OF JURISDICTIONAL STATEMENT OF UNITED AIR LINES, INC.

This brief is presented with the consent of the parties in this case. Copies of letters from the attorneys for the parties have been filed with the Clerk.

The airlines filing this statement as *amici curiae* support United Air Lines' appeal. They have large tax claims on file with the Illinois Department of Revenue awaiting the outcome of this litigation. American's claims for use taxes on airplane fuel for a six-year period exceed more than $2,400,000, Braniff's more than $88,000, and Northwest's more than $700,000. As these figures show, Illinois is the

center of major air transportation systems of the country. These airlines wish to emphasize that the Illinois Supreme Court's 4-to-3 decision is not a mere matter of statutory construction and will, if not reversed, validate a serious interference with interstate transportation.

In 1955 the Illinois legislature, in enacting the Illinois Use Tax Act (*Laws of 1955*, pp. 2027-9), used careful language to avoid even a slight burden on interstate commerce that might violate the United States Constitution. The statute exempted certain uses in order "to prevent actual or likely multistate taxation" [§ 3, par. 6, clauses (a)-(d); Ill. Rev. Stat. 1969, ch. 120, § 439.31]. Clause (b) of § 3 expressly exempted the use of "rolling stock moving in interstate commerce". Clause (d) exempted property bought outside the state, "stored here temporarily", and later "used solely outside this State". The Department of Revenue ruled, immediately and correctly, that clause (d) exempted airplane fuel bought outside Illinois, stored here temporarily, and loaded on planes in Illinois for interstate journeys except as the fuel was consumed in the engines ("burned off") within Illinois. This result created no problems of constitutionality. Its application was easy because the airlines regularly keep records of the distances flown in Illinois. It fulfilled the Illinois legislature's aim of avoiding the danger of unconstitutionality involved in "actual or likely multistate taxation".

But in 1963 the Illinois Department of Revenue disrupted this reasonable solution. On June 3, 1963 the Department's Director issued a bulletin which construed the statute to tax *all fuel loaded on planes in Illinois* regardless of where the fuel is consumed. Such a tax is of course much greater than one on fuel consumed in Illinois, because planes must often load up in Chicago with enough fuel for flights to either sea coast or even to another continent. The 1963

bulletin declared that "temporary storage ends and a taxable use occurs when the fuel is taken out of storage facilities and is placed into the tank of the airplane".

Years of litigation over the Department's 1963 bulletin have now resulted in the 4-to-3 decision appealed from, which rejects the Department's 1955 construction and sustains that of 1963. But this appeal does not seek review of the misconstruction of the meaning of the statute. Review is sought because the construction of the statute by the Illinois Supreme Court majority imposes a direct and unconstitutional tax on interstate commerce, as shown by the three opinions.

The *per curiam* opinion (App. 5-16) uses constitutional invalidity to destroy the Department's 1955 "burn-off" construction, which is claimed to violate the commerce clause. The invalidity is traced to *Helson* v. *Kentucky*, 279 U. S. 245 (1929), which held that Kentucky could not tax gasoline loaded on a ferryboat in Illinois and consumed within Kentucky. Here the *per curiam* opinion misconstrues the *Helson* holding to reach the anomalous result, as stressed in the Jurisdictional Statement of United Air Lines (p. 17), that the taxation of all the fuel loaded in the planes in Chicago is deemed less of a burden on interstate commerce than merely taxing that part of the fuel that is actually consumed in Illinois.

When the *per curiam* opinion comes to construe the language of the temporary storage exemption (App. 14-5), it gives one uncommon example of its application, i.e., to stored fuel that is moved from an Illinois airport to a Wisconsin airport (as by pipeline or tank vehicle). Under this construction the exemption never applies to, and the tax is always imposed on or measured by, the fuel loaded on the plane for an interstate journey. Thus the impact of the use tax is solely on the loading for an interstate flight.

The incidence of the tax on loading is also revealed expressly in the special concurring opinion of two justices, who describe the tax as "imposed on all of the fuel loaded on United's planes at the airports" (App. 16).

The dissenting opinion (App. 16-8) of three justices (Justices Kluczynski, Schaefer, and Davis) explains that the Department's *1955 construction* did not violate the commerce clause and is (1) a reasonable construction (2) given to the statute by the agency administering it in 1955-1963 and (3) impliedly consented to by the legislature during that period. Understandably the dissenting opinion does not discuss the commerce clause validity of the *1963 construction* which the dissenters rejected.

The event of loading fuel for an interstate journey, which the Illinois Supreme Court majority makes the incidence of the tax, is an integral part of interstate commerce under settled decisions of this Court. *Puget Sound Stevedoring Company* v. *Tax Commission*, 302 U. S. 90 (1937); *Joseph* v. *Carter and Weekes Stevedoring Company*, 330 U. S. 422 (1947); *Michigan-Wisconsin Pipeline Company* v. *Calvert*, 347 U. S. 157 (1954). The commerce clause holding in *Edelman* v. *Boeing Air Transport*, 289 U. S. 249 (1933), decided in the early days of commercial air transportation and relied on in the *per curiam* opinion, is inapplicable here. In addition to the distinctions explained in United's Jurisdictional Statement, we note that the lower court *Edelman* opinions (51 F. 2d 130; 61 F. 2d 319) show that the proceeds of the Wyoming airplane fuel tax there sustained were devoted to state airport facilities used by the taxpayer. Here the Illinois use tax has no such application.

The *per curiam* and special concurring opinions are based on misconceptions of the commerce clause that affect the Illinois Supreme Court majority's construction of the statute. The majority does not share the concern for con-

stitutional limitations manifested in the statute which the legislature artfully worded to avoid a tax on interstate transportation. The *per curiam* opinion confuses basic constitutional distinctions and reaches anomalous results that are very detrimental to airline operations.

The Jurisdictional Statement of United Air Lines demonstrates fully how the Illinois Use Tax statute, as construed by the decision appealed from, imposes a heavy toll on the fuel consumed in interstate transportation and is an unconstitutional burden on interstate commerce under many decisions of this Court.

We strongly urge this Court to review the appealed decision in order to clarify the power of the State of Illinois to tax the fuel used in nation-wide transportation systems. The questions involved are of substantial, national importance.

Respectfully submitted,

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